INVESTMENT MANAGEMENT UPDATE GERMANY– APRIL 2025

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Asset Management and Investment Funds Alert

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BAFIN PUBLISHES DRAFT GUIDANCE NOTE ON THE INFLUENCE BY INVESTORS

On 14 March 2025, the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin) published a draft Guidance Note on the possibility of investors taking influence on investment funds. The draft contains explanations and potential concerns regarding investor influence or input on investment decisions by third-party managers to investment funds. BaFin emphasizes the principle of third-party management, according to which the final decision rests with the management company (KVG) or a portfolio manager (in the case of outsourcing). BaFin views instructions as well as approval and veto rights of investors regarding individual transactions critically with regard to the principle of third-party management. BaFin also takes a critical view of acquisition initiatives (recommendations) essentially originating from the investors if the KVG no longer carries out its own evaluation. This may be particularly relevant in connection with institutional funds. The consultation ended on 31 March 2025.

ESMA PUBLISHES GUIDELINES ON THE CLASSIFICATION OF CRYPTO-ASSETS AS FINANCIAL INSTRUMENTS

On 19 March 2025, the European Securities and Markets Authority (ESMA) published guidelines on the conditions and criteria for the classification of crypto-assets as financial instruments. According to ESMA, crypto-assets can be classified as transferable securities, money-market instruments, units in collective investment undertakings, derivative contracts or emission allowances in accordance with the Markets in Financial Instruments Directive (MiFID II). In the guidelines, ESMA - like BaFin in the past - reaffirmed the principle of technological neutrality. This means that an asset classified as a financial instrument remains a financial instrument from a regulatory perspective and is primarily regulated by MiFID II even if it is tokenized. For example, a crypto-asset can be a transferable security within the meaning of MiFID II if it is not an instrument of payment, is fungible, and is negotiable on the capital market. A crypto-asset that conveys a proportional share in a portfolio managed according to an investment strategy, without providing investors with control options (e.g., voting rights), is generally a unit or share in an investment fund. In addition, the guidelines serve to further specify the types of crypto-assets. The guidelines apply from 18 May 2025.

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EBA CONSULTS ON REGULATORY TECHNICAL STANDARDS FOR THE EU ANTI-MONEY LAUNDERING PACKAGE

On 6 March 2025, the European Banking Authority (EBA) published drafts of four Regulatory Technical Standards (RTS) on the European Union's new anti-money laundering package (AML/TF package) for consultation. The anti-money laundering package consists of four legal acts that were published in the Official Journal of the European Union on 19 June 2024 and are to be applied or implemented in stages from 1 July 2025. Essentially, a new authority will be created that will directly supervise certain financial institutions in the EU, the approaches of national supervisory authorities and Financial Intelligence Units (FIUs) within the EU will be harmonised and a uniform set of rules for the prevention of money laundering and terrorist financing will be introduced for the first time. The consultation is open for feedback until 6 June 2025 and the EBA intends to submit its final report to the European Commission on 31 October 2025.

BAFIN SUPPLEMENTS INTERPRETATION AND APPLICATION GUIDANCE ON THE GERMAN ANTI-MONEY LAUNDERING ACT

In March 2025, the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin) again revised its interpretation and application guidance on the German Anti-Money Laundering Act (Auslegungs- und Anwendungshinweise (AuA) zum Geldwäschegesetz), which was last updated on 29 November 2024, and added guidance on crypto-asset service providers and certain issuers of asset-referenced tokens, following the publication of the German Financial Market Digitalisation Act (Finanzmarktdigitalisierungsgesetz) on 27 December 2024. In addition, information on increased due diligence obligations for crypto-asset transfers with self-hosted addresses has been included.

ESMA CONSULTS ON SIMPLIFICATION OF INSIDER LISTS

On 3 April 2025, the European Securities and Markets Authority (ESMA) published a consultation paper with draft implementing technical standards to extend the simplified format for drawing up and updating insider lists for issuers admitted to trading on Small and Medium Enterprises (SME) Growth Market to all issuers. A corresponding mandate for ESMA can be found in the EU Listing Act. The implementing technical standards are to contain three different model templates for insider lists, which differ depending on whether the respective Member State has decided against limiting insider lists to those persons who, due to the nature of their function or position with the issuer, always have access to inside information. The proposals aim to reduce the burden associated with the creation of insider lists. The consultation ends on 3 June 2025.

BAFIN STUDIES ON THE CERTIFICATES' MARKET

On 12 March 2025, the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin) published information on two market studies in which it examined the certificates' market for retail investors, particularly with regard to distribution practices. One study explicitly dealt with interest and express certificates, the other with turbo certificates. BaFin examined both manufacturers and distributors, and also surveyed nearly 2,000 investors who had invested in the relevant products.

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In the study on interest and express certificates (investment certificates) conducted from May 2024 to February 2025, BaFin initially noted that while these products had experienced increased sales since the end of the low-interest rate phase, no systematic misconduct or even serious deficiencies were found with regard to product distribution.

However, BaFin criticized the sometimes-flawed design of products with regard to the chosen target market definition and the fact that investors in express certificates often lacked an understanding of their functionality and risks. BaFin has announced, among other things, that it will focus its ongoing supervisory activities on this area.

In the study on turbo certificates covering the period from 2019 to 2023, BaFin noted a sharp increase in the market volume of such products but also came to the conclusion that almost ¾ of investors had to realize losses on their investments during the period under review, which amounted to a total of around EUR 3.4 billion. BaFin intends to publish detailed results in the second quarter of 2025; further measures to protect investors are still being examined.

ESMA PUBLISHES FACILITATION FOR THE PROVISION OF RESEARCH

On 8 April 2025, the European Securities and Markets Authority (ESMA) published its Technical Advice to the European Commission on the amendments to the research provisions in the MiFID II Delegated Directive. Since MiFID II, analyses (so-called “research“) are generally considered as inducements, meaning that the fees for research services must be paid by the financial service providers subject to MiFID II themselves or from a separate, client-related research payment account (so-called “unbundling regime”). Deviations from these requirements were already permitted for non-large financial service providers as part of the relief measures during the covid pandemic. Further simplifications have now become possible in connection with the EU Listing Act. ESMA therefore proposes the possibility of a joint payment of execution and research fees, regardless of the size of the financial service provider. In addition to an agreement on the part of the financial services provider, further prerequisites are that excessive payments for research and an impairment of the best possible execution of client orders are avoided.

ESMA PUBLISHES TRANSLATIONS OF GUIDELINES ON THE COMMON CLASSIFICATION OF CRYPTO-ASSETS (MICAR)

On 10 March 2025, the European Securities and Markets Authority (ESMA) published the official translation of the guidelines on templates for explanations and opinions, and the standardised test for the classification of crypto-assets under the MiCAR Regulation.

The guidelines contain the specific templates for:

- Content and form of the explanation to be attached to the white paper that the crypto-assets are not a crypto-asset exempt from MiCAR, an e-money token or an asset-referencing token;
- Content and form of the legal opinion to be submitted to the authorities for asset-referencing tokens;
- A uniform test to be applied by the authorities to classify crypto-assets.

The guidelines will apply from 12 May 2025.

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